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Municipal Stormwater Phase I Western Washington Comment
WA Department of Ecology
Water Quality Program
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To Whom It May Concern:

BIAW appreciates this opportunity to comment on the Large and Medium MS4 Permit for Western Washington. BIAW is the largest trade association in the state, representing over 11,960 members involved in various aspects of the residential construction process. The typical BIAW member builds five to 15 homes a year. Unlike national builder corporations, these members have limited resources to navigate the complicated and costly maze of land use and environmental regulations in Washington.

Unfortunately, the Large and Medium MS4 Permit for Western Washington only adds to the regulatory burden of contractors. In addition to complying with onerous state stormwater standards, they will now have an even more burdensome, duplicative process at the local level to contend with. The unfortunate result will be higher housing prices and small, generational businesses closing their doors or selling to national builders. The following comments detail BIAW's opposition and questions regarding the MS4 Permit:

1. The permit is redundant, confusing, and overly burdensome.

The permit circumvents the any flexibility of the Construction Stormwater General Permit (CSGP) by forcing local governments to impose far more stringent standards than DOE is willing to do or the EPA recommends. The permit should focus only on those projects, programs, and providers that are not currently covered by the construction general stormwater permit or industrial permit. Duplicative regulatory programs create conflicting agency opinions and directives, delay the construction process, increase the cost of housing, unnecessarily burden financially strapped local governments, and waste taxpayer money. S.5.C.5 should be eliminated because it is a regulatory reiteration of the construction and industrial general stormwater

permits. At a minimum, the permit should direct local governments to exempt construction general stormwater permit applicants from S.5.C.5.

Why are there no exemptions comparable to the construction permit? The CSGP erosivity waiver exempts a project from the entire permitting process, but the MS4 erosivity waiver only relieves the contractor from Stormwater Pollution Prevention Program (SWPPP) review. Similarly, the CSGP exempts projects that infiltrate all stormwater to the ground. The Western WA MS4 does not require local governments to give a similar exemption. The closest language to this is Appendix I, and it only allows an exemption to the seasonal work limitations.

2. **Perhaps the most egregious aspect of this permit, site plan review is unnecessary and extremely costly--to taxpayers, homeowners, contractors, and local governments.**

Construction stormwater general permit applicants should be exempt from site plan review, including Stormwater Site Plan (SSP) and SWPPP development.

- The EPA requires "procedures for site plan review of construction plans that consider potential water quality impacts." (Fact Sheet 2.6). This suggests consideration of erosion issues in the currently established platting or subdivision process. This is much different than a new, extensive permitting regime that includes development of SSPs; inspections before, during, and after construction; and enforcement for non-compliance as required by S.5.C.5.b.vi.
- SSPs must be reviewed prior to development. (S.5.C.5.b.ii, vi(1)). Because SSPs include SWPPPs, this early submission is onerous and contrary to legal precedent (see #3 below). Contractors already struggle to obtain timely permits from local governments. Adding another review process will further aggravate delays in the permitting program and add to the cost of housing. The Governor issued an Executive Order in February, 2006 (EO 06-02), that directs state agencies to reduce regulatory barriers and "make it easy to do business in the State of Washington." Ecology is doing the opposite with this permit.
- Appendix 1, 2.5, requires SSPs to be prepared as detailed in (presumably) the Western Washington Stormwater Manual ("[SSPs] shall be prepared in accordance with Chapter 3 *of this volume.*" Please clarify this language.). The Manual requires a "comprehensive report," which includes a vicinity map, site map, soils map, existing conditions summary, off-site analysis report, permanent stormwater control plan, SWPPP, special reports and studies, other permits, operation and maintenance manual, and bond quantities worksheet. A single SSP could easily cost more than 20 thousand dollars. Contractors can barely afford to develop SWPPPs, let alone the myriad of complex, engineered reports and plans of a SSP. The Manual states that the "scope of the Stormwater Site Plan also varies

depending on the applicability of Minimum Requirements." However, this reference to Section 2.4 of the Manual is not included in the permit. If Ecology intends for local governments to limit the scope of SSPs for construction projects, it needs to state as such and include the limitations. A reference is not sufficient. That being said, requiring SSPs of residential construction is unreasonable and unwieldy.

- Ecology cannot argue that SSPs and SWPPPs will not be required of small residential construction because 2.4.1 only requires SSPs (Minimum Requirement #1) for developments that create or add 2000 square feet of impervious surface or disturb over 7000 square feet. Ecology itself notes that the 2000 sq. ft. and 7000 sq. ft. standards are inclusive of almost all residential construction. ("The 2,000 square feet threshold for impervious surfaces and 7,000 square foot threshold for land disturbance are chosen to capture most single family home construction and their equivalent." WWSWM, Vol. I, 2.5)
- If the contractor applicant is developing a SWPPP (which includes a site map and engineered BMPs [if needed by the site]), why is a SSP necessary?

3. Inspections prior to clearing and construction (S.5.C.4.b.ii) and prior to final approval or occupancy (S.5.C.4.b.iv) will needlessly delay the construction process.

Most jurisdictions already have insufficient resources to process permits in a timely manner, and they do not have the means to send inspectors to all construction sites before and after construction in a timely manner. Not only is this a vast expense on local governments (and thus taxpayers), but also to contractors and new homeowners. Every day a project is delayed threatens promised financing, compounds interest on construction loans, and very likely pushes a contractor past the narrow CSGP erosivity waiver window. If Ecology must include pre, during, and post inspections, they should focus only on extremely large sites or projects with almost certain water quality impacts.

- Even if sites qualify for exemption because they do not have a "high potential for sediment transport" (S.5.C.5.b.vi(1)), the process to make this determination is complex and time consuming.
- Similarly, local governments are only required to inspect permanent stormwater treatment and flow control facilities annually. Catch basins and inlets can be done on a "circuit basis." (once before the end of the Permit term (S.5.C.9.b). In comparison, construction sites are expected to have three inspections—before, during, and after construction. Urban stormwater, flooding, and erosion problems are often the result of municipal systems in need of repair, replacement, or simple cleaning. A BIAW member recently experienced over $50,000 in commercial losses due to a municipal inlet drain in disrepair. Why should construction operators be forced to install exorbitantly costly detention and treatment

systems when the local governments are not required to do aggressive, immediate inspections and maintenance? If cost is an issue, shouldn't taxpayer money be spent here rather than on a new permitting, inspection, and enforcement program on construction sites?

- In S.5.C.4.b.iv, Ecology wants local governments to "ensure a maintenance plan is completed and responsibility for maintenance is assigned." Development of a maintenance plan is costly to a contractor. Moreover, in many residential construction projects, a maintenance plan is uneccessary as there are not permanent BMPs or other erosion control devices or they may be out of the property owners control. S.5.C.4.b.iv and S.5.C.4.c should limit maintenance plans to large projects with permanent stormwater facilities the require continuous maintenance.

4. Pre-application SSP and SWPPP review is contrary to legal precedent and conflicts with the construction stormwater permit.

Pre-application SSP and SWPPP review also undermines the flexible nature and purpose of the general permit process. CSGP applicants should be exempt from site plan review, and a completed SWPPP available at the beginning of construction, consistent with the construction permit.

- SSPs must be reviewed prior to development. (S.5.C.5.b.vi(1), Appendix 1, 2.5). The CSGP requires a SWPPP to be "prepared and implemented … beginning with initial soil disturbance and until final stabilization." The MS4 permit represents a disingenuous repeal of Ecology's decision to comply with judicial precedent and require SWPPPs at the beginning of construction. Even the language in Appendix 1, 2.5, #2 represents a slight of hand by removing reference to "prepared" ("The SWPPP shall be *implemented* beginning with initial soil disturbance and until final stabilization.").
- The Seventh Circuit Court of Appeals recently highlighted the difference between the individual and general permit process. Requiring "an additional public hearing for each individual NOI and SWPPP would eviscerate the administrative efficiency inherent in the general permitting concept." *Tex. Indep. & Ryalty Owners Ass'n et al, v Env't Prot Agency,* 410 F.3d 964, 978 (7th Cir 2005). Similarly, requiring local governments to institute early SWPPP review for the same projects obtaining a CSGP negates the efficiency intended for that program.
- Detailed, prescriptive, and enforceable requirements contained in the Construction Stormwater General Permit and included in this draft MS4 permit (i.e., required application of Western Washington Stormwater Manual) provide overwhelming assurances as to how municipalities will regulate stormwater discharges. Thus, early SWPPP review is not necessary to guarantee water quality protections (as compared to the municipal permit program at issue in *Environmental Defense Center Inc. v. EPA,* 344 F.3d 832 (9th Cir. 2003).

- Local governments do not have the resources, including manpower, to conduct SSP and SWPPP reviews before construction. If local governments are forced to do so, they will sacrifice other permitting efficiencies and services needed by the development community.

5. **The applicability standards of Appendix 1, 2.4, including the flow charts, are incredibly complex and confusing.**

   How will the local governments be able to convey these standards to the construction applicant in a simplistic manner? Moreover, how can an average builder or developer reconcile the local erosion permitting process with the CSGP? (See similar comment under #14)

6. **Requiring CESCLs (Appendix 1, 2.5, #2, 12) is unnecessary and unreasonable, particularly for sites under five acres.**

   Hiring an engineer or other specialist or designating an employee to serve as the CESCL is a great expense for the smaller contractor, especially those who have not experienced the CSGP or local erosion ordinances.

7. **What type of inspection is referred to in Appendix 1, 2.5, #2, 13 ("Based on the results of the inspection…")?**

   Is this an inspection by local government staff or by the construction site operator? Is Ecology requiring regular inspections by construction site operators? #2, 12 refers to site inspections, but there is no previous indication of required inspections and/or frequency. If Ecology intends to require weekly (and daily during rain events) inspections, the SWPPP revision and BMP implementation requirement is unreasonable. Moreover, the construction site operation could be forced into an endless loop of SWPPP revisions and BMP alterations for fear of liability exposure.

8. **Seasonal work limitations create another layer of confusion, restriction, and liability.**

   Amazingly, Ecology appears dissatisfied with the protections afforded by the CSGP, as well as individual site reviews, SSPs, SWPPPs, multiple inspections, and enforcement actions by also imposing seasonal work limitations (Appendix 1, 2.5, #2). Ecology is potentially halting construction for the majority of the year. Doing so dramatically impairs our state economy, job growth, and job retention. Please explain why this limitation is necessary. Further, does Ecology intend for this to be a separate review, approval, and/or documentation by the local government and/or the construction applicant?

9. "Qualified personnel" is vaguely defined in S.5.C.5 and Definitions and Acronyms, p 56.

- The Construction Stormwater General Permit allows only authorized representatives of DOE who present credentials and other legally required documents to enter and inspect a project site. Why does the MS4 permit not hold qualified personnel of local jurisdictions to the same standard?
- What type or amount of training is required by S.5.C.5.b.viii? What is "professional training"? (p 56) Training and standards for "qualified personnel" need to be included. These individuals are vested with review, inspection, and enforcement authority, all of which could significantly slow or stop a project. Ecology is extremely detailed about the training required of CESCLs. Why is it not equally detailed for local government stormwater personnel?
- The permit should require that Permittees and their "qualified personnel" document all decisions, actions, statements, reviews, reports, requirements, etc. and provide the same in writing to the construction applicant. Construction sites permit holders should be notified in writing and provided a copy of all inspections and enforcement actions, including "inspection reports, warning letters, notices of violations, and other enforcement records." (S.5.C.5.b.vi(6)) All warning letters and violation notices should include a full description of the problem; the statute, ordinance, or other regulation violated; and the enforcement action being taken.

10. Local governments should be required to review existing codes and regulations for allowance of LID practices, especially impervious surface requirements in the form of wide roads, sidewalks, curbs, and cut-outs.

If contractors are to have an "[understanding and use of Low Impact Development (LID) techniques" (S.5.C.10.b.ii(6)), local governments need a parallel understanding of which local codes, regulations, or design standards prevent the use of LIDs. Similarly, S.5.C.5.b.iii should be reworded to state: "The program ***and supporting and related ordinances*** must allow non-structural preventive actions…".

11. Unlike the Eastern MS4 permit and Western Small MS4 permits, as well as the CSGP, this permit does not allow jurisdictions to offer an erosivity waiver.

The jurisdictions applying for this permit similarly experience dry seasonal weather, making the costly and burdensome stormwater site plan, SWPPP, and inspection process unnecessary.

12. Why is the authorized non-stormwater discharge list (S.5.C.8.b.ii(1)) different than the CSGP?

The list does not include excavation de-watering, water used to control dust, routine external building wash, and landscape irrigation. At a minimum, S.5.C.8.b.ii(2) should state: "The regulatory mechanism shall prohibit the following categories of post-construction non-stormwater discharges…".

13. Exposed soil requirements (Appendix 1, 2.5, #2) are limited and redundant.

- These are unreasonable time restraints, particularly in drier regions of Western Washington. The cost of covering all soils with blankets or plastic, including the man hours, is impressive and only adds to the cost of housing.
- This represents a mandatory, prescriptive imposition of what should be an optional BMP. The directive is for the contractor to determine and install the best BMPs to prevent turbid discharge that impairs water quality. Covering exposed soils is one of the BMPs that a contractor can use, but it is not always the best or most efficient.

14. Almost all residential development will be required to comply with Minimum Requirement #5 and the costly and complex roof downspout control BMPs and dispersion and soil quality BMPs contained in the Western Washington Stormwater Manual.

The determination and application process of these BMPs will delay the permitting process, push project applicants past CSGP erosivity windows, and be extremely costly, as specialized reports and engineers will be necessary in most cases. Moreover, there is yet another threshold for contractors to grapple with: 22,000 square feet. How will the average contractor understand (or the local government explain) the myriad of standards and thresholds (e.g., 1 acre disturbed, under ½ acre in a subdivision, 35% existing impervious surface, 2,000 sq. ft. impervious surface, 7,000 sq. ft. disturbed land, 22,000 sq. ft. lot sizes, 5,000 sq. ft. of new impervious surface, ¾ acres converted to lawn, etc.)?

15. The forested land cover standard is unrealistic, and the alternate provisions are vague and unsupported.

Minimum Requirement #7, Flow Control, establishes a forested land cover standard, unless the land was historically prairie or "the drainage area of the immediate stream and all subsequent downstream basins have had at least 40% total impervious area since 1985." In what specific jurisdictions (cities, counties, towns, watersheds, areas) does this apply? Will mapping of these areas be provided? Are project applicants expected to determine whether a

forested land cover or existing land cover standard applies (based on project location and local development history)? Adding to the confusion, if "basin specific studies determine a stream channel is unstable, … the pre-developed condition assumption shall be the 'historic' land cover condition commensurate with achieving a target flow regime identified by an approved basin study." What type of "basin specific studies" is Ecology referring to? What is the "historic land cover condition"? What are "approved basin stud[ies]"? How flexible will Ecology be in approving alternative requirements? This is particularly important given the unreasonableness and impracticality of the forested land cover standard, particularly in developing urban areas or those targeted for development, and in consideration of the copious amounts of current land use controls and requirements designed to limit land impacts.

16. Basin or watershed plans (S.5.C.4.b.i, Appendix 1, 2.5 #9) add another burdensome and conflicting layer of regulations.

Moreover, Ecology suggests that these planning groups and their plans impose "[m]ore stringent requirements." This undermines needed consistency, predictability, and efficiency for the building community.

17. The building community should be adequately represented in the public participation process (S.5.C.2).

At a minimum, a land developer and builder representative should be fully involved in the development, implementation and update of the local government's SWMP, as specified in the MS4 permit.

18. There is a distinct lack of incentives for developing small sites in this permit, including waivers, exemptions, or bonuses.

Because the impervious surface and disturbed land requirements are so low, almost all residential construction will be forced to do the same complex and costly stormwater planning and installation. Give contractors a reason to build on smaller lots (less land impact) or promote urban infill (less rural impact), by requiring less paperwork, expense, and liability. The flow chart for determining redevelopment requirements, Figure 2.3, Appendix 1, is an excellent example of this point. Looking at this chart, what incentive do builders have to redevelop lots within existing urban areas with functioning stormwater systems? Ecology promotes smart growth and growth management, yet it does nothing in this permit to entice builders to develop and re-develop in the urban core.

BIAW appreciates your consideration of these comments and significant amendment of the Western Washington Large and Medium MS4 Permit to alleviate its unnecessary and unreasonable impact to the construction industry.

Sincerely,

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Of Counsel